

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of FRANK C. LEONE and DEPARTMENT OF THE NAVY,
NAVAL SHIPYARD, Philadelphia, PA

*Docket No. 02-1146; Submitted on the Record;
Issued September 2, 2003*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether appellant received a \$7,882.92 overpayment for compensation; and (2) whether the Office of Workers' Compensation Programs abused its discretion by refusing to waive recovery of the overpayment.

This is the third appeal in the present case. In the prior appeal, the Board issued a decision¹ on March 1, 2002 that set aside and remanded a March 20, 2000 decision by the Office on the grounds that the Office did not provide adequate findings of fact and reasoning to support its determination that appellant received a \$7,882.92 overpayment of compensation that was not subject to waiver. The Board stated that the Office did not specify whether it had finalized its preliminary determination that appellant was not at fault or whether it had determined that he was at fault. Furthermore, the Board found that the Office failed to explain on what basis the deduction of \$100.00 a month to recover the overpayment was justified.

In an August 16, 1999 decision, the Office preliminarily found that an overpayment of \$7,882.92 after appellant changed his health insurance plan, effective January 14, 1990, to a more expensive health plan. The error was discovered on June 16, 1999. Between January 14, 1990 and June 16, 1999, the Office deducted from appellant's compensation \$11,229.22 for health insurance, when it should have deducted \$19,112.14, resulting in an overpayment to appellant of \$7,882.92. The Office also found that appellant was not at fault for the error and informed him that he could request a waiver and must submit financial documentation.

Subsequent to the Board's March 1, 2002 remand, the Office indicated, in a March 26, 2002 memorandum to the file, that appellant requested a waiver but did not submit any financial documentation or evidence to support that his current compensation income did not meet his current ordinary and necessary expenses. His monthly compensation was \$2,217.14 every 28 days. In a March 26, 2002 decision, the Office reissued its August 16, 1999 decision, finding

¹ Docket No. 00-1513 (issued March 1, 2002).

that appellant had received an overpayment in the amount of \$7,882.92 and that a waiver was not granted because appellant did not submit any financial documentation.

The Board finds that appellant received an overpayment of \$7,882.92 for the period January 14, 1990 to June 19, 1999.

In the present case, the record contains evidence which shows for the period in question the Office deducted for health insurance premiums \$11,229.22, when it should have deducted \$19,112.14, resulting in an overpayment to appellant of \$7,882.92. The record further shows that the Office found that appellant was not at fault for the overpayment and, therefore, was eligible to request a waiver.

Although appellant was found to be without fault in the matter of the overpayment, he nevertheless bears responsibility for providing the requisite information to support waiver of the overpayment. Section 20 C.F.R. § 10.438 states:

“(a) The individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by [the Office]. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of the [Federal Employees’ Compensation Act] or be against equity and good conscience. This information will also be used to determine the repayment schedule, if necessary.

“(b) Failure to submit the requested information within 30 days of the request shall result in denial of waiver and no further request for waiver shall be considered until the requested information is furnished.”

However, the Board notes that, in its March 26, 2002 decision, where the Office made its new determination of overpayment and that appellant was without fault, there is no indication that the Office attempted to secure current financial information from him in order to make a determination regarding a payment plan. The only request for financial information, which appellant never provided, was set forth in the Office’s preliminary finding of overpayment in its letter of August 16, 1999, which was almost three years from the date of its final determination. As the Office requested financial information approximately three years ago, the Office should have attempted to obtain current information regarding appellant’s income, expenses and assets. It is appellant’s current financial situation, at the time of the waiver determination, that must be considered, not information relevant to the period of the overpayment itself.² As the Office never provided appellant an opportunity to provide any current financial information, the Office was precluded from exercising its regulatory responsibility to consider an equitable repayment rate, which would minimize any resulting hardship upon him. The Act provides, in part, that waiver is possible, when the individual from whom recovery is sought needs substantially all his or her “current income” to meet “current ordinary and necessary living expenses.” Thus, the Office must use updated financial data in determining whether waiver of the recovery of the overpayment is permitted.³ As the Office made no effort to obtain new information from

² See *Ronald E. Smith*, 36 ECAB 652 (1985).

³ See *Diane J. Johnson*, Docket No. 96-2583 (issued November 12, 1998).

appellant before issuing its decision, the case will be remanded to the Office to secure current financial information relevant to his current earnings and expenses to establish an appropriate payment plan to recover the overpayment. After such further development as the Office deems necessary, it should issue an appropriate decision.

The March 26, 2002 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part and remanded to the Office for further action consistent with this decision of the Board.

Dated, Washington, DC
September 2, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member